



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
Division of Water Resources
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Nashville, Tennessee 37243

December 18, 2020

Todd N. Tillinger, P.E.
Chief, Regulatory Division
U. S. Army Corps of Engineers
3701 Bell Road Nashville, TN 37214

SUBJECT: Section 401 Water Quality Certification
Reissuance of Nationwide Permits

Dear Mr. Tillinger:

The Tennessee Department of Environment and Conservation (TDEC) Division of Water Resources acknowledges its responsibility for providing or withholding § 401 Water Quality Certifications for the Army Corps of Engineers (ACOE) § 404 Nationwide Permits (NWP). TDEC appreciates the ACOE's recent stakeholder efforts soliciting comments on the proposed NWPs, and in proposing certain specific regional conditions designed to help minimize impact to the waters of the state from any discharge of dredged or fill material authorized under an NWP. As part of the NWP reissuance process, the state has comprehensively reviewed each of the NWPs proposed for reissuance (including any proposed modifications) and five newly proposed NWPs. In this letter TDEC provides a detailed listing of conditional certifications for some of the ACOE's proposed NWPs, while certification for others are declined or not required.

Section 401 of *The Clean Water Act* (33 U.S.C. § 1341) requires an applicant for a federal permit that results in a discharge to obtain a water quality certification from the state that a discharge from a Federally licensed or permitted activity will comply with water quality requirements. Therefore, the state of Tennessee is required to certify whether or not any activity authorized by a proposed NWP that results in a discharge into Waters of the United States in Tennessee will meet all applicable water quality standards and requirements.

Accordingly, TDEC requires reasonable assurance that all activities conducted under these NWPs will not violate provisions of *The Tennessee Water Quality Control Act of 1977* (T.C.A. § 69-3-101 et seq.) or §§ 301, 302, 303, 306 or 307 of *The Clean Water Act* (CWA).

The proposed NWP's were published in the *Federal Register* Vol. 85, No. 179 on September 15, 2020. This publication of the proposed NWP's in the *Federal Register* serves as the ACOE's application for water quality certification under § 401 of the CWA for those NWP's that will result in a discharge to Waters of the United States in Tennessee.

The *Tennessee Water Quality Control Act of 1977* (TWQCA) requires state permits for activities that will alter the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state. Many activities that alter the physical properties of state waters are also regulated in waters of the United States by Section §404 and may be regulated at a federal level under the proposed NWP's. Tennessee has issued statewide general permits pursuant to that Act which authorize types of activities that in many cases generally correspond with the types (but not necessarily the scope, methods, or regulatory limitations) of activities authorized by the NWP's. We also authorize additional types of activities under individual state water quality permits. Coverages under these state general and individual permits also serve as §401 water quality certifications for those activities that meet the conditions of the state permits.

The Department has developed procedural requirements for public notice and participation for permits both under the TWQCA and Section §401, and has compared its procedural and regulatory requirements with those of the Army Corps of Engineers. The Department and ACOE have participated in recent discussions pertaining to §401 water quality certifications between the regulatory agencies. The complexity and efficiency of different processes were examined, and permit conditions evaluated. Based on the nature of the state's §401 water quality certifications and its own Aquatic Resource Alteration Permit (ARAP) program, including differences outlined below, the Department has determined it is in the best interest of the regulated community, and the public, to retain the state's ability to determine the best regulatory framework to protect all aspects of water quality by in most cases retaining separate authorization programs. Therefore, in most cases the State will continue to review proposed activities and provide timely project-specific §401 water quality certifications for activities that require a §404 authorization. We do find, though, that for certain limited activities the Division's statutory and procedural requirements can be met, and have provided certification, or limited conditional certification of some of the NWP's, including those represented by general permits that the Department has already issued under the TWQCA where a notice of coverage is not required.

The reasons for Tennessee's decision to limit certification of the NWP's are many, and are based both on the state's extensive and specific water quality regulations that must be met, and the broad and sometimes ill-defined range of activities that could be potentially be covered under the various NWP's. Even where there are clear limitations in scale of a discharge that may be authorized under a specific NWP, those limits often clearly exceed the established *de minimis* thresholds, or do not contain other necessary conditions that would render the associated degradation *de minimis*. The state's water quality standards require activities authorized on any stream segment or waterbody in the state to meet specific criteria and maintain support of the classified uses designated for that particular stream segment or waterbody, and must review impacts proposed for permit or certification on a case by case basis using the most recent assessment and measured parameter by parameter.

In addition, Tennessee's water quality standards provide different procedural requirements for different waters of the state. For instance, for waters that are already impaired for a designated use by a particular pollutant, the State cannot authorize (or certify) further significant degradation of the unavailable parameter. Degradation of Exceptional Tennessee Waters can only be authorized if there are no feasible alternatives and the degradation is necessary to accommodate important economic or social development

in the area and will not otherwise violate the water quality criteria. Degradation is prohibited within Outstanding National Resource Waters.

Finally, the federal NWP regulatory framework in many situations allows significant discretion to the Corps' District Engineer to waive NWP permit limits on the scale of impact allowable, to decide on a case-by-case basis what may constitute a "designated critical resource water", to add project-specific conditions to a NWP for a specific proposed activity, and to determine when and what type of mitigation may be required for a specific proposed activity. This flexibility produces great uncertainty of the exact nature, scale, and resource impact of activities that may be authorized at the federal level by the NWPs in the State of Tennessee, and therefore in most cases prohibits TDEC from carrying out its responsibility of providing a §401 water quality certification that all activities potentially covered by a NWP will meet the State's water quality standards in a defensible manner. It is our understanding that per NWP general condition #25 (*Water Quality*), the only situation in which a state may require additional water quality management measures to ensure that the activities authorized by a NWP do not result in more than minimal degradation of water quality, is where the state has not previously certified compliance of an NWP with CWA Section §401.

Therefore, the state of Tennessee hereby provides the following certification, conditional certification, or denies certification without prejudice, for the NWPs in waters of the United States within the state of Tennessee, as follows in the table below. It should be noted that several of the proposed NWPs apply only to activities and waters covered under Section §10 of the *Rivers and Harbors Act of 1899*, and do not involve Section §404 permitting. In addition, some NWPs pertain to activities in types of Waters of the U.S. that do not occur within the State of Tennessee. Accordingly, activities conducted under these NWPs do not, or will not require §401 water quality certifications from the State.

For conditional certifications we have provided statements explaining why these conditions are necessary to assure that any discharge authorized under the general NW permits will comply with water quality requirements; and a citation to federal, state, or tribal law that authorizes the conditions. Similarly, for certification denials we have provided the specific water quality requirements with which discharges that could be authorized by the general NW permits will not comply, and a statement explaining why discharges that could be authorized by the general NW permits will not comply with the identified water quality requirements. These statements, state water quality requirements, regulations, and legal citations for each conditionally certified or denied NWP are provided in Appendix A. The text for each legal citation is provided in Appendix B.

A summary table of the certified NWPs, certified NWPs with attendant conditions, denied NWPs, and those with other status is provided below.

Nationwide Permit	Tennessee 401 Water Quality Certification	Certification Conditions
NWP 1- Aids to Navigation	Not Required ¹	
NWP 2- Structures in Artificial Canals	Not Required ¹	
NWP 3- Maintenance	Certified with Conditions	Certified maintenance activities are limited to the excavation of accumulated sediments and debris obstructing or impeding the function of existing structures such as dams, intake and outfall structures, utilities, culverts, and bridges in streams or reservoirs, for a cumulative maximum of 100 linear feet immediately above and/or below the structure, including removal of displaced riprap, and/or the placement of riprap within 25 feet upstream and 25 feet downstream of existing structures.
NWP 4- Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities	Certified	
NWP 5- Scientific Measurement Devices	Certified	
NWP 6- Survey Activities	Certified with Conditions	Certification is conditionally limited to temporary stream and wetland impacts (fill, excavation, or compaction), including access activities, which may not cumulatively exceed 0.10 acres of wetland or 200 linear feet of stream in magnitude of disturbance. Upon completion of survey activities, all temporary stream and wetland impacts are to be restored to a pre-construction condition.
NWP 7- Outfall Structures and Associated Intake Structures	Denied	
NWP 8- Oil and Gas Structures on the Outer Continental Shelf	Revoked ²	
NWP 9- Structures in Fleeting and Anchorage Areas	Not Required ¹	
NWP 10- Mooring Buoys	Not Required ¹	
NWP 11- Temporary Recreational Structures	Not Required ¹	
NWP 12- Oil or Natural Gas Pipeline Activities	Denied	
NWP 13- Bank Stabilization	Certified with Conditions	Activities where the length of the reservoir shoreline or stream banks (one or both banks, but not the channel bed) to be treated does not exceed a total length of 50 feet (limited to one site per 1000 linear feet of stream or reservoir bed) is solely certified. <i>NOTE : Additional activities may be previously certified under 18-PGP-01 and 20-RGP-01. -</i>
NWP 14- Linear Transportation Projects	Denied	
NWP 15- U.S. Coast Guard Approved Bridges	Denied	

NWP 16- Return Water From Upland Contained Disposal Areas	Denied	
NWP 17- Hydropower Projects	Denied	
NWP 18- Minor Discharges	Denied	
NWP 19- Minor Dredging	Denied	<i>NOTE : Additional activities may be previously certified under 18-PGP-01 and 20-RGP-01.</i>
NWP 20- Response Operations for Oil or Hazardous Substances	Certified with Conditions	Emergency Repair work, limited to 300 linear feet of stream impact and up to 0.10 acres of wetland impact from qualifying 404 discharges, where immediate repairs are necessary to protect human health, safety or the environment from immediate threats are solely certified.
NWP 21- Surface Coal Mining Operations	Denied	
NWP 22- Removal of Vessels	Certified	
NWP 23- Approved Categorical Exclusions	Denied	
NWP 24- Indian Tribe or State Administered Section 404 Programs	Revoked ²	
NWP 25- Structural Discharges	Certified with Conditions	This Nationwide permit is conditionally certified solely for the, installation of support pilings, anchors or similar structures for a private dock or boathouse in lakes, ponds or reservoirs <i>NOTE : Additional activities may be previously certified under 18-PGP-01 and 20-RGP-01.</i>
NWP 27- Aquatic Habitat Restoration, Establishment, and Enhancement Activities	Denied	
NWP 28- Modification of Existing Marinas	Not Required ¹	
NWP 29- Residential Developments	Denied	
NWP 30- Moist Soil Management for Wildlife	Denied	
NWP 31- Maintenance of Existing Flood Control Facilities	Denied	
NWP 32- Completed Enforcement Activities	Denied	
NWP 33- Temporary Construction, Access, and Dewatering	Denied	
NWP 34- Cranberry Production Activities	Denied	
NWP 35- Maintenance Dredging of Existing Basins	Not Required ¹	

NWP 36- Boat Ramps	Denied	<i>NOTE : Additional activities may be previously certified under 18-PGP-01 and 20-RGP-01.</i>
NWP 37- Emergency Watershed Protection and Rehabilitation	Denied	
NWP 38 - Cleanup of Hazardous and Toxic Waste	Denied	<i>NOTE : Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act</i>
NWP 39 - Commercial and Institutional Developments	Denied	
NWP 40- Agricultural Activities	Denied	
NWP 41- Reshaping Existing Drainage Ditches	Certified with Conditions	The alteration of Waters of the United States formally designated by TDEC as a wet weather conveyance (per Rule 0400-40-03-.05(9)) is solely certified.
NWP 42- Recreational Facilities	Denied	
NWP 43- Stormwater Management Facilities	Denied	
NWP 44- Mining Activities	Denied	
NWP 45- Repair of Uplands Damaged by Discrete Events	Denied	
NWP 46- Discharges in Ditches	Certified with Conditions	The alteration of Waters of the United States formally designated by TDEC as a wet weather conveyance (per Rule 0400-40-03-.05(9)) is solely certified
NWP 48- Commercial Shellfish Mariculture Activities	Revoked ²	
NWP 49- Coal Remining Activities	Denied	
NWP 50- Underground Coal Mining Activities	Denied	
NWP 51- Land-Based Renewable Energy Generation Facilities	Denied	
NWP 52- Water-Based Renewable Energy Generation Pilot Projects	Denied	
NWP 53- Removal of Low-head Dams	Denied	
NWP 54- Living Shorelines	Revoked ²	
NWP A – Seaweed Mariculture Activities	Revoked ²	
NWP B- Finfish Mariculture Activities	Revoked ²	
NWP C- Electrical Utility Line and Telecommunications	Denied	

Activities		
NWP D- Utility Line Activities for Water and Other Substances	Denied	
NWP E- Water Reclamation and Reuse Facilities	Denied	

For the certified NWP, or conditionally certified NWP above, the Division finds that it can certify that a discharge from a Federally licensed or permitted activity conducted under the NWP, and meeting these conditions where applicable, will comply with water quality requirements, will not violate water quality standards, will not result in more than *de minimis* degradation, and do not otherwise compromise procedural requirements of our regulations. We understand that subsequent to your receipt of these certified, or limited conditional certifications, persons who qualify for the subject NWP under the above conditions would no longer need to provide the Corps of Engineers or the Tennessee Valley Authority with a request for an individual § 401 water quality certification.

For all other activities seeking coverage under the § 404 NWP, the state of Tennessee hereby denies certification, without prejudice, in waters of the United States within the state of Tennessee. We understand that this will in no way preclude the USACE's ability to provide § 404 authorizations through use of these NWP, once they have received a § 401 certification from the state.

Through our state water quality permitting program, we remain prepared to take timely action on requests for § 401 certifications on an individual, project-specific basis.

The Division appreciates the opportunity to provide comment and collaborate with the Nashville and Memphis Districts throughout the NWP reissuance process. The Division looks forward to further regulatory coordination with the ACOE.

Sincerely,



Jennifer Dodd, Director
TDEC Division of Water Resources

CC: Robbie Sykes, U.S. Fish and Wildlife Service, Cookeville, TN
Rob Todd, Tenn. Wildlife Resources Agency, Nashville, TN
Ashley Monroe, U.S. Environmental Protection Agency, Atlanta, GA
Mr. Greg Williams, Chief, Regulatory Branch, Corps of Engineers, Memphis District
Paul Pearman, Tennessee Valley Authority

¹ NWP's for activities with no discharges and waters covered under Section 10 of the Rivers and Harbors Act of 1899 do not require §401 water quality certifications from the State

² -It is the Department's understanding that the local USACE Districts intend to revoke these NWP's for which the types of potentially affected Waters of the United States do not occur within Tennessee.